

# In the Supreme Court of the United States

OCTOBER TERM, 1940.

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No. ....

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MANUEL PELELAS,

*Petitioner,*

vs.

CATERPILLAR TRACTOR COMPANY,

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION.

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### OPINIONS OF THE COURTS BELOW.

The opinion of the Seventh Circuit Court of Appeals was rendered June 27, 1940. It is reported in 113 F. (2d) 629 (1940), and appears in the Record on pages 76 to 81.

The opinion of the District Court of the United States for the Southern District of Illinois, Northern Division, in this case is reported in 30 Fed. Supp. 173 (1939), and appears on pages 55 to 63 of the Record.

### JURISDICTION.

This Court has jurisdiction to review the judgment of the Seventh Circuit Court of Appeals by virtue of Section 240 of the Judicial Code as amended by Act of Congress, February 13, 1925. (c. 229, Section 1, 43 Stat. 1938.)

### STATEMENT OF THE CASE.

This is a class action brought by the plaintiff for himself and others insured under a group policy of insurance issued to the defendant company, asking that the defendant account for dividends which it has received from the

insurer. Without answering the complaint, defendant moved to dismiss. That motion was granted, the action was dismissed and judgment for the defendant entered accordingly. Plaintiff appeals because of errors arising out of the affirmance of that judgment by the Seventh Circuit Court of Appeals.

Those material facts alleged by the plaintiff and admitted by the defendant's motion to dismiss are as follows:

In June, 1930, the Caterpillar Tractor Company, defendant herein, entered into a contract of insurance with the Metropolitan Life Insurance Company whereby the insurance company agreed to insure such of the defendant's employees as cared to become insured by virtue of the policy and to pay a portion of the premium. (R. 17.)

The contract between the defendant and the insurance company was evidenced by what is known as a Group or Master Policy. (R. 17 *et seq.*) Employees who became insured under this plan of group insurance were only issued certificates as evidence thereof. (R. 40 *et seq.*) These were issued by the insurer to the Caterpillar Company for delivery to each insured employee. (R. 30.)

After the Caterpillar Company had entered into the group contract with the insurer, it presented the plan to its thousands of employees. Thousands of these (at least seventy-five per cent, R. 38) made application for insurance through the defendant company and became insured under the policy.

Manuel Pelelas, the plaintiff, was one of those so insured. The plaintiff, like a multitude of others, applied for insurance under the Group Policy through the Caterpillar Company. (R. 39.) The plaintiff, like thousands of others, became insured under the Group Policy. (R. 51.) The plaintiff, like all who became insured, received a certificate to evidence his contract with reference to the Group Policy. (R. 30 and 40.) This certificate, like all the certificates received by those insured, was issued by the insurance com-

pany to the Caterpillar Company for delivery to each insured employee. (R. 30.) And the plaintiff, like many others—some for more and others for less—became insured for “Two Thousand Dollars of Life Insurance One Thousand Dollars of Accidental Death and Dismemberment Insurance and for a benefit of Ten Dollars per week of Temporary Disability Insurance.”

Pelelas and those others insured by the Group Policy paid their share of the premium to the Caterpillar corporation and through it to the insurance company, as provided by the policy. (R. 35-37.)

By the provisions of the policy and as a part of the group plan, the insured employees paid the greater part of the premium. The defendant-employer contributed the small portion remaining. (R. 51.) The insured employees' share of the premium was collected from them by the Caterpillar Company through wage deduction authorizations. That company then contributed the amount remaining and turned the entire sum over to the insurer in payment of the premium.

The Group Policy is a participating contract of insurance, so-called. It provides that the insurance company shall annually determine any divisible surplus that has accrued and shall apportion that to the employer, and “in either event, such divisible surplus is to be distributed or applied by the employer, according to the respective rights thereto—if any—of the parties contributing to the premiums hereunder.” (R. 29.)

At various times the insurance company having ascertained the divisible surplus that had accrued by reason of the Group Policy and the contracts issued under it, paid to the Caterpillar Company large sums of money as dividends from this divisible surplus. The defendant has retained these dividends and has never apportioned them among those who paid the premiums under the insurance contracts. (R. 51, 52.)

The insured employees did not know that dividends were to be paid on the participating contract, nor did they know until shortly before the filing of this lawsuit that such dividends had been paid.

Plaintiff seeks by this action to impress a constructive trust upon the dividends received by Caterpillar Company from the insurance company and to compel Caterpillar to disgorge.

This is brought as a class action by the plaintiff as an insured under the policy and for all others so insured. (R. 51.) The complaint alleges that the plaintiff is one of the class which he seeks to represent. And that the question which is the subject matter of this lawsuit is one of common and general interest to all who are or were insured under said policy of group insurance. (R. 51.)

It is also alleged that those who are or were insured under the Group Policy are "many thousands in number \* \* \* and it is wholly impracticable to bring them all before the court." (R. 51.)

The plaintiff filed this action in the Circuit Court for Tazewell County, Illinois. (R. 2.) Upon defendant's motion the cause was removed to the United States District Court for the Southern District of Illinois. (R. 6, 7.) There the defendant did not answer the complaint, but made "Consolidated Motions to Dismiss the Complaint and for Judgment for the Defendant; To Strike Certain Portions of the Complaint; and for a Bill of Particulars." (R. 7.) The District Court, Adair, *J.*, granted the defendants' motion to dismiss, dismissed the action and entered judgment for the defendant. He rendered an opinion resting his judgment chiefly on two grounds: (a) That the plaintiff is not representative of the class; and (b) The plaintiff's complaint does not state a cause of action. (R. 55-62.)

Plaintiff appealed from this judgment to the United States Circuit Court of Appeals for the Seventh Circuit, which Court affirmed the decision of the District Court.

Plaintiff has brought this case before the Supreme Court of the United States claiming that the decisions of both the Circuit Court and the District Court are in error and should be reversed.

### **SPECIFICATION OF ERRORS.**

The Circuit Court of Appeals erred in holding that:

(1) Plaintiff had failed to state a cause of action.

(2) Plaintiff is not representative of Caterpillar's insured employees composing the class on whose behalf this suit is brought.

### **A R G U M E N T.**

#### **SUMMARY.**

It is the position of the plaintiff that this case is controlled by those principles of equity which arise from fiduciary relationships. Plaintiff's claim to recovery does not rest upon any contract between Caterpillar and its insured employees.

It is further our belief that the relation of the insured whom plaintiff represents and Caterpillar Tractor Company is that of principal and agent. When the group plan went into effect, Caterpillar Company became the agent of the insured for that transaction. As agent of the insured, it carried on the group insurance plan.

The duties of a fiduciary were incumbent upon Caterpillar. Caterpillar had a duty to account for all money which it received as a result of the group transaction. There was a duty of disclosure to its principal that dividends might be received under the Group Policy and that they were received.

Dividends were received by Caterpillar and no accounting was made to its principal, the insured employees. Therein was a breach of fiduciary duty and, therefore, a constructive trust should be imposed upon those dividends and the defendant should be forced to disgorge.

The Seventh Circuit Court of Appeals held that plaintiff had failed to state a valid claim. And it upheld the decision of the District Court in dismissing plaintiff's complaint and entering judgment for defendant.

That decision was erroneous.

This is a class suit. And we further argue that the Circuit Court of Appeals was mistaken in holding plaintiff not to be a proper representative of the class.

It is plaintiff's position that under Rule 23 of the Federal Rules of Civil Procedure, the class may be represented by one of its members whose interest in this suit is compatible with and of the average of the class. If the party seeking to be a representative has no interest antagonistic to the class and has thus indicated that he is in such a position as to be sincere and honest in the prosecution of the suit that he should be held to be a proper representative.

We will demonstrate that the plaintiff is such a person and has the necessary qualities for adequately representing the insured employees of the Caterpillar Tractor Company.

## I.

### **PLAINTIFF HAS STATED A CAUSE OF ACTION IN HIS COMPLAINT.**

**A. Plaintiff Has Set Forth a Right to Share in the Dividends Received by the Caterpillar Tractor Company Upon the Theory of a Breach of Fiduciary Relationship.**

1. The Caterpillar Company is the agent of the insured employees with regard to matters concerning the group plan.

It has been frequently decided that the group insurance arrangement is such as to constitute the employer the agent of the insured employees.

*Equitable Life Assur. Soc. v. Hall*, 253 Ky. 450, 451, 452, 69 S. W. (2d) 977 (1934) in holding that the employer

was not the agent of the insurance company and, therefore, knowledge by the employer that the plaintiff employee was over the age limit, when the policy was issued, was not imputable to the insurance company, states (pp. 452, 453):

"If the relation of principal and agent exists between any two of the three parties involved, the insurer, the employer, and employee, it could be more logically said that such agency is between the employer and employee. The employer obtained the insurance for the benefit of its employees. The employer is not interested financially or otherwise in the insurance company, but it is interested in securing the benefits of insurance for its employees. Thus it will be seen that the relation of principal and agent existed between employer and employee and not between employer and insurer."

See also:

*Conn. Gen'l Life Ins. Co. v. Spear*, 185 Ark. 615, 616, 48 S. W. (2d) 553 (1932).

The reasons underlying this view are perfectly logical. The group plan is for the benefit of the employees. The employer forwards the employees' applications to the insurer (R. 23, 39). Certificates are delivered by the insurance company to the employer, who delivers them to those insured (R. 30, 40). Moreover, the employer collects and forwards the premiums on behalf of the insured employees (R. 28).

All these things show the tenor of the relationship between the Caterpillar Company and its insured employees. They have been principal and agent. It has been a relationship imposed by the very nature of the group plan—a relationship of complete reliance and confidence by the insured in the Caterpillar Company. They have relied upon and trusted the defendant. That they have done so is clear enough from the fact that the group plan contemplated that the employer should care for and protect their interests under the policy.

Judge Peaslee, discussing the group insurance plan in *Duval v. Metropolitan Life Ins. Co.*, 82 N. H. 543, 550, 136 A. 400, 50 A. L. R. 1276 (1927), said (p. 550):

"The employee was told that the employer held the master policy, and must be deemed to have known that such holding was on his behalf, and not for the insurer. He knew that the employer was paying a part of the premium. In short, he knew the whole general scheme. His employer was undertaking to benefit him by transacting the insurance business and carrying a part of the cost. His confidence was put in his employer, not in an agent of the insurer.

\* \* \* \* \*

"\* \* \* The employer sought and obtained from the insurer a contract for their benefit. Naturally the employee looks to the employer for guidance and information. There is nothing sinister in such a situation. Their interests are not adverse, but common. The outstanding fact that the employer has interested itself in this matter and has undertaken a part of the financial burden for the benefit of the employees, shows that in the ordinary course of events the employee would be expected to place reliance in his benefactor, and would think of the employer in that light rather than consider it to be the representative of the insurer. The insurance was something the employer and employees were to obtain by their joint efforts. It was not something the employer was engaged in getting as a representative of the insurer."

*The insured employees have, of course, never seen the Master Policy. They have never known that there were to be dividends paid until now. The Caterpillar Company never disclosed that fact.*

**2. The Caterpillar Company has broken its fiduciary duty to the insured in refusing to distribute the dividends.**

By failing to apportion the dividends which it has received, the defendant is guilty of a breach of faith with

the insured. There can be no question that an agent receiving funds from a third party for whom he is dealing must so advise the principal and account to him for those funds.

The *Restatement of Agency* fully supports our argument:

**"Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal."**

"Comment:

"a. Ordinarily, the agent's primary function is to make profits for the principal, and his duty to account includes accounting for any unexpected and incidental accretions whether or not received in violation of duty. Thus, if the agent receives a bonus from a party with whom he deals on account of the principal, the agent is under a duty to pay this to the principal even though otherwise he has acted with perfect fairness to the principal and violates no duty of loyalty in receiving the amount."

And this illustration is precisely in point (Illustration 3):

*"3. A, acting for P, takes out insurance on P's premises, advancing the amount of the premium and having the insurance taken in his own name to secure his advances. The insurance company declares a rebate or dividend upon the premiums paid. A is under a duty to credit this to P in spite of a contrary usage among insurance agents, not known to P."* (Italics ours.)

*Restatement, Agency, Section 388, pp. 870, 871.*

Just as an agent who makes profits out of transactions which he is conducting on behalf of his principal must account for those profits, so must the Caterpillar Tractor Company account to those insured under the Group Policy for the dividends that it has received as a result of that policy. Failing to do this, the agent must be held for a breach of his fiduciary position.

3. The complainant seeks recovery upon principles of equity rather than upon any contract.

The basis for plaintiff's claim is one of equity. Plaintiff asks for such "relief as equity and good conscience require." (R. 52.) It is our contention that Caterpillar has broken its fiduciary duty to the insured. And equity and good conscience require that Caterpillar should account for the divisible surplus which it has received as a result of the transaction which it has been carrying on for those insured. Our action is one to impose a constructive trust upon dividends received by the Caterpillar Company.

The Caterpillar Company is the agent of the insured employees and it has been consistently so held.<sup>1</sup> In such a fiduciary position, the Caterpillar Company carried on a transaction on behalf of the insured employees. That transaction was a group plan of insurance. The premiums on that Group Policy were paid largely by the insured employees who are represented by the plaintiff in this lawsuit. The remainder was contributed by the defendant company.

In the course of this transaction, the insurance company, to which Caterpillar had paid the funds of its insured employees for the great part of the premium, ascertained that there was a dividend on this particular policy and paid that dividend to the Caterpillar Company. In the meantime, Caterpillar and its employees had made no agreement that the Caterpillar Company should be permitted to retain those dividends without apportioning them.

*The fact of the matter is that the insured employees did not know at that time that dividends had been paid. They didn't even know when they entered into the group plan and received certificates of insurance which were issued to them through the Caterpillar Company that the*

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<sup>1</sup> *Supra*, p. 10.

Group Policy provided for the payment of dividends in the event that a divisible surplus was ascertained by the insurance company.

a. **The Participation Clause points the way to the operation of equity.**

The Participation Clause of the Group Policy provides:

“Section 5. Participation.—This Policy is a participating contract and the Company shall annually ascertain and apportion any divisible surplus accruing under policies of this class. Any such divisible surplus shall be paid in cash to the Employer or, upon written request from the Employer to the Company, shall be applied to the payment of the aggregate of the premiums next falling due under this Policy. *In either event, such divisible surplus is to be distributed or applied by the Employer, according to the respective rights thereto—if any—of the parties contributing to the premiums hereunder.*” (R. 29.) (Italics ours.)

We believe that the reasonable interpretation of this clause is that the employer should distribute the divisible surplus received to those who have contributed to the payment of the premiums, in proportion to their contributions.

The Group Policy is a third party beneficiary contract between the insurance company and the defendant employer for the benefit of those employees who became insured.

“\* \* \* Such contracts do not create a contract of insurance between the employer and the employee, but are between the employer and the insurer for the benefit of the insured employees. \* \* \*”

Couch, *Cyc. of Insurance*, Vol. 1, Section 29, p. 44 (1929).

See:

*Myerson v. New Idea Hosiery Co.*, 217 Ala. 153, 115 So. 94, 55 A. L. R. 1231 (1937);

See:

*Emerich v. Conn. Gen'l Ins. Co.*, 120 Conn. 60, 64, 65, 179 A. 335 (1935);

*Crawford, Group Insurance*, Section 15, p. 30 (1936).

If the Participation Clause is ambiguous, then it ought to be construed here favorably to the insured. Where questions of interpretation have arisen between the employer and the insured employees, the Group Policy has been consistently construed favorably to the insured. One of the reasons for this rule lies in the fact that an insurance contract is the result of negotiations between the employer and the insurer. And therefore, if ambiguous words are used, it is only fair that as between the employer and the insured, any doubt should be resolved in favor of the insured and against the employer, as the latter is one of the makers of the master contract.

*However, as we have pointed out before, plaintiff does not rely upon contract. And we wish to make it indelibly clear that the rights of the insured rest upon grounds of equity relative to fiduciary relationships.*

Under plaintiff's theory for recovery, it is immaterial whether the Participation Clause gives the insured a right to dividends. However, that Clause clearly permitted Caterpillar to make an agreement with its insured employees whereby the insured would have given up all right to dividends. *No such an agreement was made.* And in view of that fact, the Participation Clause points the way to the operation of equitable principles which dictate the distribution of dividends to those who have contributed to the payment of the premium.

b. Plaintiff does not seek recovery upon "an agreement not pleaded."

A glaring fallacy of the Circuit Court's opinion lies in the attempt of that Court to force this case into a form of action founded upon contract.

The Court said:

"Plaintiff averred that defendant entered into an agreement with its employees but he did not plead the substance of any such contract. He failed to state whether it was written or oral. He omitted any averment as to its contents or character and the court was left wholly in the dark as to its nature and effect. The only information presented to the court upon the subject was the pleading of plaintiff of his application for insurance, which expressly provided that his insurance was to be issued to him in accordance with the company's 'announcement.' Thus the trial court's only information was that plaintiff was claiming that defendant had received money paid to it which equitably belonged to plaintiff because of an agreement not pleaded, when, as a matter of fact, his own pleading disclosed that he had applied for the insurance in accordance with the announcement which he did not bring before the court. There was, therefore, before the court nothing in the way of facts pleaded, by virtue of which it would be said as a matter of law that defendant owed plaintiff anything." (R. 78.)

With regard to the Court's statement that plaintiff averred that Caterpillar had entered into an agreement with its employees, we assume that the Court refers to paragraph 5 of plaintiff's second amended complaint (R. 50) which states:

"(5) Thereafter the insurance company with the Caterpillar corporation entered into agreements with numerous employees of the Caterpillar corporation and permitted all employees wishing insurance under said Master Policy to make application therefor. The plaintiff made application, and a copy of said application is hereto attached and marked plaintiff's Exhibit 2 and made a part hereof. Thereafter, as evidence of insurance under said Master Policy, the insurance company, through the Caterpillar corporation, delivered to the plaintiff a certificate of insurance, a copy of which is hereto attached and marked plaintiff's Exhibit 3 and made a part hereof."

The agreements referred to in paragraph 5 of the plaintiff's second amended complaint are quite clearly those agreements which were embodied in the certificates of insurance. A certificate was made a part of the complaint as Plaintiff's Exhibit 3, certifying that the plaintiff was insured in a given amount. (R. 40.) It is exactly like the other certificates so issued, and was attached to show plaintiff's relation to the group plan.

The certificate says nothing about dividends. And plaintiff certainly makes no claim to dividends because of the certificate.

No reasonable person would attempt to twist plaintiff's allegation into an averment that there was a contract between defendant and the insured that the defendant would turn over to its insured employees an aliquot share of the dividends received because of the Group Policy.

Plaintiff is not "claiming that defendant had received money paid to it which equitably belonged to plaintiff because of an agreement not pleaded."

Again, plaintiff rests his case upon the ground that equitable principles governing breaches of a fiduciary relationship control this case.

c. In order to establish a valid cause of action plaintiff need not show a contractual relation between Caterpillar and the insured.

The Circuit Court of Appeals says that plaintiff does not rely on contract for recovery. But on the other hand, it insists that plaintiff must show either an express or implied contract between the insured and Caterpillar in order to succeed in this law suit.

The Circuit Court states:

"In its essence, plaintiff's claim was not founded upon the insurance contract between the Metropolitan Life Insurance Company and defendant." (R. 78.)

With this, we are in total accord.

And then that Court asserts that plaintiff must rely on contract, saying:

“Rather it was an action for money had and received, and in order to constitute a valid cause of action, it was essential that it disclose something in the relationship between plaintiff and defendant, *either under an express contract or under facts raising an implied contract*, whereby it could be said, as a matter of law, that defendant had received money which it should and was legally bound to pay to plaintiff.” (R. 78.) (Italics ours.)

Rather than an action for money had and received, this is more properly an action for breach of a fiduciary relationship to impose a constructive trust upon funds inequitably and wrongfully withheld by an agent from its principal.

We agree that it was essential to disclose something in the relationship between plaintiff and defendant whereby the defendant should have apportioned the dividends among the insured. *But it is not a fact and certainly does not follow that that relationship must be founded upon a contract.*

The relation between the plaintiff and defendant is a fiduciary one which compels the defendant to account for profits which it has received from a transaction carried on for the benefit of insured employees.

**4. No agreement was made between Caterpillar and the insured employees which would permit the Caterpillar Company to retain the dividends.**

Had Caterpillar and its insured employees entered into an agreement whereby that company was to have held the dividends for its own use, then the insured would have no basis for complaint. But no such agreement was made.

The Court of Appeals says that the Participation Clause does “not define the rights of the parties” (R. 78) with regard to dividends.

Assuming this to be true, then the group contract confers no right upon defendant to retain those dividends.

*The defendant has brought forward at no time any agreement between the parties which would permit the retention of dividends by the defendant company.*

It is not incumbent upon the plaintiff to disclaim any defensive matter, but plaintiff has disclaimed knowledge of any such agreement and states once again that there is no such agreement. It is no part of this record. It has not been advanced by defendant at any time in this case either in the District Court or in the Circuit Court of Appeals. Such an agreement was never made.

#### 5. Plaintiff's pleading is not contradictory and inconsistent.

The Circuit Court of Appeals has bitterly assailed plaintiff for not pleading a so-called "company's announcement" which was supposedly made with reference to the group plan. That Court has concluded that there is something insidious in plaintiff's action and that his pleading is "contradictory and inconsistent." (R. 79.) His pleading is claimed to be inconsistent on the ground that plaintiff has alleged on the one hand that no such "announcement" exists, and on the other says that he "applied for insurance in accordance with the 'company's announcement.' "

It is true that plaintiff denies the existence of a "company's announcement." (R. 52.) But it is not true that plaintiff averred that he applied for insurance in accordance with any such announcement.

The Circuit Court of Appeals in a statement that is quite inaccurate said:

"\* \* \* The only information presented to the Court upon the subject was the pleading of plaintiff of his application for insurance, which expressly provided that his insurance was to be issued to him in

accordance with the company's 'announcement.' \* \* \* his own pleading disclosed that he had applied for insurance in accordance with the announcement which he did not bring before the court. \* \* \* (R. 78.)

"\* \* \* he had in his formal application expressly incorporated the announcement by reference. Consequently his pleading was contradictory and inconsistent, for, in the very pleading upon which he based his cause of action upon an agreement in accordance with the announcement, he denied its existence. \* \* \* (R. 79.)

Once again, the Seventh Circuit Court of Appeals is thoroughly mistaken. Apparently that Court did not bother to read plaintiff's application which is Exhibit 2. (R. 39.) For if it had, the Court would have found that *plaintiff did not apply for "insurance in accordance with the announcement,"* but that he applied for the "FORMS" of insurance to which he was entitled. (Emphasis ours.)

The pertinent part of plaintiff's application reads:

"I hereby apply for the **forms** of Group Insurance to which I am or may be entitled in accordance with the company's announcement." (Emphasis ours.)

Plaintiff is not complaining as to the *form* of insurance he received. Hence, any contradiction that might exist with regard to this point is quite immaterial to this law suit.

Moreover, it is quite clear from the above statement quoted from plaintiff's application that any "announcement" which might exist would deal only with the *forms* and *types* of insurance available under the group plan, and, therefore, it would have no bearing here.

Plaintiff stated in his complaint (R. 52) that he was unaware of the identity and circumstances of the "company's announcement," and, therefore, denied its existence. And he further stated "*that under no circumstances is it any part of the contract of insurance.*" (R. 52.) (Italics supplied.)

That should have disposed of the matter. It is not incumbent upon the plaintiff to go forward any further on that subject in his complaint. If the plaintiff were erroneous in pleading that any "annoucement" which might exist had no connection with the contract, then it is for the defendant to come forward with pleading and proof to that effect. Suffice it to say that defendant has come forward with nothing.

However, further discussion of this matter is rendered unnecessary by the Master Policy itself which provides:

"Section 6. Incontestability.—This Policy \* \* \* the application of the Employer, \* \* \* and the individual applications—if any—of the Employees, constitute the entire contract between the parties, \* \* \*."

Although utterly disregarded by the Circuit Court, this section is controlling. It carefully declares the component parts of the group contract and eliminates any "company's annoucement" from being any part of it.

## II.

### **PLAINTIFF IS PROPERLY REPRESENTATIVE OF THE CLASS ON BEHALF OF WHICH HE BRINGS THIS ACTION.**

#### **A. The Holding of the Circuit Court of Appeals is Wrong.**

The Circuit Court of Appeals rested its opinion that the plaintiff was not a proper representative upon the following grounds:

- (1) "Plaintiff and his counsel resided many hundreds of miles from the seat of the court."
- (2) "Plaintiff was not and had not been for more than three years employed or insured."
- (3) Plaintiff's interest was small.
- (4) Plaintiff and "his counsel had been unable to present a valid claim in spite of two opportunities to amend complaint."
- (5) "Plaintiff made no averment that other persons had made claim similar to his or were asserting such claims or had asked that suit be brought."

- (6) "The pleadings were contradictory in form and wholly ineffective."
- (7) Plaintiff's "action was essentially one to recover for plaintiff moneys claimed to be due him as moneys had and received and, inasmuch as there was no showing as to the contents or character of the various contracts with the different employees, no showing as to whether they differed or were identical, it was impossible to find that plaintiff adequately and fairly represented any other members of the asserted class."
- (8) "There must be a sufficient number of persons to insure a fair representation of the class."

A mere statement of the factors upon which the Circuit Court relied in holding the plaintiff not to be a proper representative illustrates that that Court either does not appreciate the meaning of adequate representation under Rule 23, or that it was so utterly biased against the plaintiff that it sought ways of holding against him.

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## **B. Plaintiff Fulfills the Requisites for Representation.**

### **1. The requirement of adequate representation.**

Rule 23 (a) specifies:

"\* \* \* such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, \* \* \*."

The nature of this condition is such as to make certain that there will be an honest and sincere contest by the person representing the class.

It appears from the authorities that the representative must demonstrate that the interests of those composing the class will be adequately litigated and their rights satisfactorily protected.

"\* \* \* The safest rule seems, again, to be that there must be a showing of representation that will satisfy the court that the interests of the absentee parties will be

adequately protected by the representative, plaintiff or defendant. \* \* \*

*2 Moore's Federal Practice*, p. 2235, Section 23.03 (1938).

To be an adequate representative of the class, plaintiff's interest must be "co-extensive and wholly compatible with the interests of those whom he would represent."

*2 Moore's Federal Practice*, pp. 2232, 2233, Section 23.03 (1938).

We wish to assure the Court that plaintiff has no adverse interest and that his interest is compatible with the average of the class.

## 2. One may sue on behalf of the group.

Rule 23 (a) specifically provides that "one or more" may sue on behalf of the whole, and although at common law there was considerable doubt whether one or more than one must sue to represent the class, Rule 23 (a) leaves no doubt that numerical representation is not to be the test of whether the class is properly represented or not. This would seem conclusive from the fact that the April, 1937 draft was revised by the final report of the Advisory Committee in November of 1937, to read:

" '(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such [a number] of them, *one or more*, as will fairly insure the adequate representation of all may, on behalf of all, [join as plaintiffs or be joined as defendants] *sue or be sued*, when the character of the right sought to be enforced for or against the class is \* \* \*. The Final Report struck out the matter which is in brackets, and added the italicized matter. The first change adds clarity to the requisite numerical representation. The second change is wholly verbal."

*2 Moore's Federal Practice*, p. 2235, Section 23.04, footnote 45 (1938).

Many cases decided under the old federal rules and under state statutes which were similar have also held that one person could represent the entire class.

In the case of *Cloyes v. Middlebury Electric Co.*, 80 Vt. 109, 66 Atl. 1039 (1907), suit was brought by one on behalf of a group injured by the obstruction of a stream.

In *Macon Railroad Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442 (1890), one on behalf of all citizens of a town was held to be representative.

*Gramling v. Maxwell*, 52 Fed. (2d) 256 (D. C. N. C., 1931), permitted one taxpayer to sue on behalf of four hundred others.

*Skinner v. Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921), decided that one taxpayer could maintain an action for eight hundred and seventy four other taxpayers.

The assertion of the Circuit Court to the effect that Rule 23 (a) is more stringent than the former Equity Rule 38 in this regard is quite without foundation.

That Court said in its opinion:

"The rule carried into the present code the essence of former Equity Rule 38. It is even more stringent; and under it the court is at liberty to consider the number appearing on record as contrasted with the number in the class; 2 *Moore's Federal Practice*, Section 23.03, p. 2234; and whether the relationship between the parties to the record is unique or one identical and common with that of all others of a class, 2 *Moore's Federal Practice*, Section 23.02, p. 2225. There must be a sufficient number of persons to insure a fair representation of the class."

Quite obviously, Rule 23 (a) is a considerable extension, elaboration and clarification of Equity Rule 38.

And as to the point of whether one person may represent the class, it seems clear that it was the intent of the framers of the rules to permit one person to represent the class by the very wording of the rule itself and by the

changes that were made from the draft to the present rule cited above.

The erroneous construction which the Seventh Circuit Court of Appeals places on Rule 23 deserves correction, and is illustrative of the faulty approach which the Court took to this entire problem.

**3. Plaintiff's interest is compatible with that of the class and is of the average.**

One of the reasons given by the Circuit Court of Appeals for holding plaintiff not representative was that his interest in the subject matter was small.

Plaintiff's interest in the total amount involved in this law suit is perhaps small, but the point to be remembered is that plaintiff's interest is of the *average* of the class and is compatible with the class. Obviously the interest of any single person or of any single group would be small in comparison with the total interest.

The plaintiff's life was insured for Two Thousand Dollars (\$2,000.00). (R. 3.) Probably some of the class were insured for more and some for less.

Let it be clearly borne in mind that *the record does not show, nor is there any evidence in this case to indicate that any one person was employed or insured any longer or in any amount greater than the plaintiff.*

Plaintiff has a substantial interest in the outcome of this action. He has no antagonistic interest, but to the contrary, his interest is identical to that of the class of which he is a member. His appeal to this Court is in and of itself an ample demonstration of the fact that plaintiff is seeking sincerely and honestly to prosecute this action to a favorable conclusion on behalf of those whom he represents.

The class is composed of those who are or were insured under the Group Policy. The common interest binding them together is their right to share in the divisible

surplus which has been distributed to the defendant corporation. The right of the plaintiff hinges upon the same common question.

Plaintiff has alleged that he was an employee of the Caterpillar Company, and that he received a certificate under the Group Policy and became an insured. His complaint also sets forth that he has brought this action for himself and those who are or were likewise insured. Attached to the complaint are plaintiff's application for insurance and his certificate. The Master Policy is also attached, showing the rights of the insured. All these things show the plaintiff's identity of interest with the class. It is difficult to conceive what else could have been alleged to indicate one more representative than the plaintiff.

**4. It is not necessary that the plaintiff be presently employed or presently insured to adequately represent the class.**

The Circuit Court of Appeals and the District Court assert that plaintiff is not a proper representative in this suit because he is no longer a member of the class when his employment ceases.

This is absurd. When plaintiff became insured and remained insured for four years his rights to share in the divisible surplus accrued and became fixed and vested rights. These rights which he and others insured have, are several, and necessarily vary in amount. But they all arose in exactly the same manner and are affected by exactly the same common question. And the persons in whom these rights have vested are therefore all members of the class; and their present status of employment or insurance—or non-employment or non-insurance does not and cannot limit or affect these rights which have vested.

The class for which this action is brought is composed of those insured under the Group Policy. They are

the only ones who have any interest in the common question of being entitled to a proportionate share of the dividends. Certainly those employees who were not insured under this group policy have not the slightest right nor interest in this question.

This is clear from the policy itself which was by its own provisions not to be effective until seventy-five per cent (75%) of all eligible employees of Caterpillar Tractor Company had made application for insurance under it, and had become insured. (R. 38):

“\* \* \* if the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives of the class if they had never been near the Duke; they are not incompetent because they may have been turned out of the market. *In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members.*  
\* \* \*” (Italics ours.)

Lord Macnaghten in *Duke of Bedford v. Ellis* (1901),  
A. C. 1, 7.

*And yet* the opinions of the Circuit Court and that of the Trial Court both hold that the plaintiff was not a representative and rest, in part, upon the fact that: “The plaintiff was not and had not been for more than three years employed or insured; \* \* \*.” (R. 80.)

*The fact of the matter is that if the plaintiff cannot bring this action, then no one ever can.*

If the test of adequate representation is that laid down by the Circuit Court and the Trial Court, namely, that only one who is now employed by Caterpillar will insure adequate representation, then a class action to determine the matter of Caterpillar’s right to retain the dividends it

has received is inexorably impossible. The Caterpillar Company, being the employer, could prevent such an action by simply discharging any employee who sought to sue. Once having been discharged, under the test approved by the Circuit Court, he would no longer be representative, for he would no longer be a member of the class, not being an employee. Through this means the entire class could be deprived of the right to have its interests determined by a class action.

If employment or present insurance under the group policy is a requirement of adequate representation, there would be brought into play an economic persuasion that augurs against justice. The ordinary employee is in no position to risk the loss of his job. And if we are to approach this problem from any kind of a realistic basis there can be no doubt that any employee of the defendant company would soon be without employment if he sought to bring such an action.

The decisions of the Courts below enunciated a deplorable doctrine that should not be upheld.

It should be pointed out that by the termination of employment, insurance under the group policy is also terminated. (R. 30, 31.)

Therefore, whether the test of adequate representation is that the representative be presently *employed* or presently *insured* under the group policy, the result is the same. Either test would place control of this litigation in the hands of Caterpillar. Under either requirement, the defendant could terminate the class action by terminating the representative's employment. We urge that neither test be adopted.

*Present employment and present insurance are not necessary for adequate representation.*

5. It is not required that the plaintiff be requested by other members of the class to bring this action.

The Circuit Court of Appeals further contends that the defendant is not representative because: "Plaintiff made no averment that other persons had made claim similar to his or were asserting such claims or had asked that suit be brought." (R. 80.)

We believe that the adequacy of plaintiff's representation does not rest upon any such basis, either now under Rule 23 of the Federal Rules of Civil Procedure or at common law.

*Kinney v. Pocock*, 8 O. N. P. N. S. 121, 128, 19 O. D. 354 (1908), was an action by two persons suing on behalf of eleven hundred others for breach of contract. It was held that the plaintiffs could maintain that class suit without authority, consent or knowledge by the rest of the class.

Plaintiff has not alleged that anyone else has requested that he bring this action, nor is it necessary that he so allege. In most instances, the representative of the class, as the plaintiff here, is self-appointed. The following statement indicates the truth of our position that no one need request the representative to bring the action.

"Although normally the plaintiff-representative of the group is self-appointed, conditions may arise where he is not. \* \* \*"

2 *Moore's Federal Practice*, p. 2234, Section 23.04 (1938).

If a person, to be adequately representative, had to obtain the consent or suggestion of other persons in the class, the efficacy of class actions would be greatly deterred. No such requirement exists in Rule 23, and never has existed.

However, with regard to the point asserted by the Circuit Court of Appeals that plaintiff had made no averment that "other persons had made claim similar to his or

were asserting such claims or had asked that suit be brought," in fairness, it must be remembered that paragraph seven of the complaint (R. 51) says this:

"(7) The Plaintiff was an employee of the corporation and received one of the certificates of insurance under said group policy of insurance; and he brings this action for himself individually, and on behalf of all other former and present employees of the Caterpillar Corporation who held or hold certificates of insurance under said policy of group insurance and who are situated similarly to this plaintiff; \* \* \*."

It is our contention that this is a fully sufficient allegation with regard to the plaintiff's representative qualities, in this regard and that no more is necessary or required.

**6. That plaintiff's counsel are from Cleveland, Ohio, does not make the plaintiff less representative.**

The Circuit Court of Appeals in adopting the view held by the District Court further base its opinion that the plaintiff is not representative of the class upon the ground that "plaintiff and his counsel resided many hundreds of miles from the seat of the court." (R. 80.)

When the Circuit Court's opinion was first handed down, certain errors appeared therein with regard to the residence of the plaintiff. At first, the Court said that the plaintiff was a resident of Cleveland. That was corrected to the State of Illinois. Now, the fact of the matter is that the plaintiff resides in Peoria, Illinois, which was the seat of the District Court.

It is true that plaintiff's counsel is from Cleveland, Ohio, a fact which, of course, has no bearing upon the rights of the plaintiff or of the class. Plaintiff might have retained counsel from California, New York, or Texas, and his rights in the premises and his qualities as a proper representative would remain the same regardless of the location of his counsel.

The entire point of the Court in this matter is irrelevant. But it is important to be considered in the respect that it shows the utter lack of realism and the utter lack of fairness accorded the plaintiff in the Seventh Circuit Court of Appeals and the District Court for the Southern District of Illinois.

**7. In spurious class actions, the requirements for adequate representation are not rigid.**

A fact that should not be overlooked, although it was utterly disregarded below, is that since this is the type of action covered by Rule 23 (a) (3), a "spurious class action," the requirements of representation are necessarily relaxed.

Those composing the class are insured for various amounts and have therefore made varying contributions toward paying the premiums. Hence, their rights are several and will vary in proportion to the amount of their contributions. Therefore, it would be impossible to find one person who would be absolutely and inexorably representative of every phase of this action.

"The spurious class action presents a somewhat different situation. Since each party may have a different claim or defense, it is doubtful if any party ever adequately represents any other in all phases of the case. \* \* \*"

Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 34, 58 (1937).

*Independence Shares Corporation v. Deckert*, 108 F. (2d) 51, 55 (C. C. A. 3, 1939), held that a class suit could be maintained under Rule 23 (a) (3) on behalf of purchasers of certain savings certificates which had been sold to them through fraud, and a common relief granted "despite the fact that individuals may recover separate judgments different in amounts. \* \* \*"

**8. The Court is empowered to protect the interests of the class under Rule 23 (c).**

The control which the Court has over this class action by virtue of Rule 23 (c) will insure the proper prosecution of this cause and adequately protect the interest of the class. Rule 23 (c) provides as follows:

*“(c) Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.”

*Fed. Rules Civ. Proc.*, 82 L. Ed. 1582 (1937).

By virtue of this provision, power is vested with the Court to require that notice of a proposed dismissal or compromise be given to the members of the class. This places the Court in an advantageous position to protect the rights of all the parties interested in the common question.

Professor Lesar, in his article *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 59 (1937), points out that:

“\* \* \* The rule (Rule 23) is a great improvement over the vague generality of the usual code provisions; its frank recognition of the desirability of the spurious class action is commendable, and settles a conflict among the decisions. *The explicit requirement that the original parties secure the consent of the court before compromising or dismissing the action should afford more protection to the parties represented.* It also should lead to a more general prohibition against those represented bringing separate actions, a practice which tends to destroy one of the values of the representative action and of codes in general, namely, avoidance of a multiplicity of suits.” (Italics ours.)

We made this argument in the Court below. It was totally misunderstood there, both by the Court and by

counsel for the defendant. The Court's opinion in this respect was taken from the defendant's brief. (R. 80.)

"Plaintiff insists that the court should not have dismissed the action without notice to others of the asserted class. Rule 23 (c), upon which he relies, forbids dismissal of such an action without the approval of the court. But this applies only to voluntary dismissals. It is intended to prevent a collusive dismissal by plaintiff of an action in which others may be legitimately interested. It does not apply to an order of dismissal of the court upon the merits."

The Court, from this quotation, apparently understands the significance of Rule 23 (c) in the abstract, but did not appreciate our particular application of it.

We did not insist that the action could not be dismissed without notice to the others of the class. We did argue, however, and we argue again, that since the Court has control over voluntary dismissals and can prevent collusive dismissals that this gives an added reason for permitting a class suit by an individual as is contemplated by Rule 23 (a).

This point again sheds light upon the utter lack of understanding accorded this case by the Circuit Court of Appeals.

**A WORD WITH REGARD TO THE OTHER POINTS UPON WHICH THE CIRCUIT COURT RELIED.**

(1) The Court said that the plaintiff was not a representative of the class and that his pleadings were contradictory and wholly ineffective.

Such a statement as this with regard to representation of a person in a class suit is utterly without relation to the problem.

(2) The Circuit Court relied upon an assertion that since this was an action for money had and received, and there was no showing as to the contents or character of the various contracts with the other employees, "it was impossible to find that plaintiff adequately and fairly represented any other members of the asserted class."

This point also has nothing to do with plaintiff's qualities as a representative. This statement can only go to the point of whether or not there is a class. That problem has already been dealt with before. Aside from all this, the statement is altogether unfair. Our complaint does not lend itself to this criticism.

An examination of paragraph seven (R. 51) of plaintiff's complaint supports our position in this regard.

"(7) The plaintiff was an employee of the corporation and received one of the certificates of insurance under said group policy of insurance; and he brings this action for himself individually, and on behalf of all other former and present employees of the Caterpillar Corporation who held or hold certificates of insurance under said policy of group insurance and *who are situated similarly to this plaintiff*; and says further that the question which is the subject matter of this lawsuit is one of common and general interest to all of the former and present employees of the Caterpillar Corporation, and who are or were insured under said policy of group insurance. The holders or former holders of said certificates of insurance are very numerous and are many thousands in number;

and many of them are non-residents of the State of Illinois; and are not known to this plaintiff and cannot with reasonable diligence be ascertained by him; and it is wholly impracticable to bring them all before the court." (Italics supplied.)

(3) **It was not within the discretion of the Trial Court to find the plaintiff an inadequate representative in the absence of evidence.**

The Circuit Court of Appeals decided that the order of dismissal by the District Court was a discretionary order and that it would not be interfered with in the absence of improvident action. However, in view of Rule 23 (a) (3) which specifically provides that one or more may bring a class action where several rights are affected by a common question, it was not within the discretion of the Trial Court to decide that the plaintiff was not properly representative *in the absence of evidence bearing upon that question.*

A careful search of the record will reveal that there is not a shred of evidence showing any bad faith, lack of sincerity or lack of honesty on the part of the plaintiff.

(4) **The Circuit Court of Appeals said that the plaintiff was not representative because plaintiff and counsel had been unable to present a valid claim in spite of two opportunities to amend complaint.**

Here is the history of the pleading in this case: Plaintiff filed a complaint to which there was a motion to dismiss. Under order (R. 13), we were permitted to amend by attaching exhibits and an amended complaint was filed to which we attached the Master Policy, the application for the certificate and the certificate of insurance.

It was then contended that the "announcement" ought to be attached in view of the statement referred to in the application (R. 39) concerning the "announcement." We then filed a second amended complaint (R. 53) disavowing that the "company's announcement" was any part of the contract.

Now just what all this has to do with the plaintiff being an adequate representative of the class is frankly beyond us and is, moreover, far and away beyond the scope of Rule 23. It appears to be some straw seized upon by the Circuit Court of Appeals upon which to found their opinion. It definitely is no reason for finding the plaintiff not properly representative.

### **CONCLUSION.**

The plaintiff has stated a good cause of action.

The defendant carried on a transaction of group insurance as the agent of its insured employees. As a result of that transaction, it received funds for which it did not account even though its principal, the insured, had paid the greater part of the premium. It was, therefore, guilty of a breach of fiduciary relationship and a constructive trust should be imposed upon those funds.

Plaintiff here was formerly insured under the Group Policy and is adequately representative of the class. He acquired a vested right to his pro-rata share of the dividends received by Caterpillar during the years of his employment. That right cannot be forfeited or destroyed because of later termination of employment. He is a member of the class to whom these funds should be paid and there is no reason in the Record why he is not a perfectly proper person to bring this suit.

Thus, the decisions of the Circuit Court of Appeals and the District Court were both erroneous and should be reversed. The action of the District Court in entering a judgment of dismissal was wholly unwarranted, and this case ought to be remanded for a determination of the issues of this cause.

Respectfully submitted,

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